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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1927

No. 539

FREDERICK A. COOK, *Petitioner*,

vs.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

BRIEF ON BEHALF OF PETITIONER

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OPINION OF THE COURT BELOW

The opinion of the Circuit Court of Appeals will be found in 19 Fed. (2nd), 826. The District Court rendered an opinion which is not reported, but which is found in the record, pp. 17-50.

GROUNDS OF JURISDICTION

The judgment of the Court below, reversing and rendering the judgment of the District Court, was rendered June 14, 1927. (R. 55, 56). On September 12, 1927, petitioner applied to this Court for a writ of certiorari, under Sec. 240-A, Judicial Code, as amended by the Act of February 13, 1925, (C. 229, 43 Stat., 936-938). The writ was granted October 31, 1927.

QUESTION PRESENTED

The question presented is whether the Probation Act passed by the Congress of the United States on March 4, 1925, (Comp. S. Sec. 105644-5-105644-5C, 43 Stat L., Chap. 521, Page 1259), authorized the Court of original jurisdiction to place upon probation a person convicted at a term of court which expired prior to the passage of said Act, and who, at the time of applying for and obtaining probation, was serving a sentence in the penitentiary.

STATEMENT

On February 8, 1927, Petitioner, Frederick A. Cook, who had previously and on November 21, 1923, been convicted in the United States District Court for the Northern District of Texas, on 12 counts of an indictment for violation of Sec. 215 of the Criminal Code, and sentenced to serve a total of fourteen years and nine months in the United States Penitentiary at Leavenworth, Kansas, and to pay a fine of one thousand dollars ($1,000) on each of the twelve counts, and who en-

tered the said penitentiary in April of 1925, and was then serving said sentence, filed his application in the District Court, for probation under the terms of the Probation Act passed by Congress on the 4th day of March, 1925. (R. 1-4).

A hearing was had on said application and the answer thereto filed by the Government (R. 4-7), at the close of which the Court being satisfied that the ends of justice and the best interests of the public, as well as the petitioner, would be subserved thereby, on the 17th day of March, A. D. 1927, granted said application, placed Petitioner upon probation for five years, suspended the execution of the sentence imposed and ordered that the warden and other officers in charge of the Penitentiary forthwith release and discharge Petitioner. (R. 7, 8). On appeal by writ of error to the Circuit Court of Appeals for the Fifth Circuit, said order of the District Court placing Petitioner upon probation, as aforesaid, was, on the 14th day of June, A. D. 1927, reversed, and judgment rendered denying Petitioner's application for probation. (R. 55, 56).

SPECIFICATION OF ERROR

It was error for the Circuit Court of Appeals to hold that the Probation Act passed by Congress March 4, 1925, did not have the effect of continuing control in the Court rendering the judgment until the judgment is satisfied, and that it did not empower the Court of original jurisdiction to place Petitioner upon probation

even though he was convicted at a term of Court which expired prior to the passage of the Act and who, at the time of applying for probation and obtaining an order granting the same, was serving his sentence in the United States Penitentiary.

SUMMARY OF ARGUMENT

1. Opening statement.
2. Adjudicated cases dealing with Federal Probation Law.
    a. Holding in the instant case.
    b. Decisions of other Federal Courts regarding probation.
3. State court decisions regarding probation laws.
4. Statutory construction.
5. Advisability of construction contended for from standpoint of supposed beneficiaries thereunder.
6. Advisability of construction contended for from standpoint of whether District Courts should be entrusted with the power.
7. Looking to Committee Reports and Congressional Debates for aid in interpreting the Act.
8. Constitutionality of Probation Act.
9. Conclusion.

ARGUMENT

The provisions of the Probation Act passed March 4, 1925, in so far as we deem them pertinent to the question here involved, are as follows (43 Stat. L., Chap. 521, Page 1259):

"Sec. 1. That the courts of the United States having original jurisdiction of criminal actions, except in the District of Columbia, when it shall appear to the satisfaction of the Court that the ends of justice and the best interests of the public, as well as the defendant, will be subserved thereby, shall have the power, after conviction or after a plea of guilty or nolo contendere for any crime or offense not punishable by death or life imprisonment, to suspend the imposition or execution of sentence and to place the defendant upon probation for such period and upon such terms and conditions as they may deem best; or the court may impose a fine and may also place the defendant upon probation in the manner aforesaid. The court may revoke or modify any condition of probation, or may change the period of probation; PROVIDED, That the period of probation, together with any extension thereof, shall not exceed five years.

"While on probation the defendant may be required to pay in one or several sums a fine imposed at the time of being placed on probation and may also be required to make restitution or reparation to the aggrieved party or parties for actual damages or loss caused by the offense for which conviction was had, and may also be required to provide for the support of any person or persons for whose support he is legally responsible.

"Sec. 2. That when directed by the court, the

probation officer shall report to the court, with a statement of the conduct of the probationer while on probation. The court may thereupon discharge the probationer from further supervision and may terminate the proceedings against him, or may extend the probation, as shall deem advisiable.

"At any time within the probation period the probation officer may arrest the probationer without a warrant, or the court may issue a warrant for his arrest. Thereupon such probationer shall forthwith be taken before the court. At any time after the probation period, but within the maximum period for which the defendant might originally have been sentenced, the court may issue a warrant and cause the defendant to be arrested and brought before the court. Thereupon the court may revoke the probation or the suspension of sentence, and may impose any sentence which might originally have been imposed."

Petitioner contends that the said provisions of the Probation Act are plain and unambiguous and that they empower the courts of original jurisdiction to place upon probation a person convicted at a term of court which has expired and who is serving his sentence in the penitentiary, the only condition being that it shall appear to the satisfaction of the court that the ends of justice and the best interests of the public, as well as the defendant, will be subserved thereby; that the statute provides that this may be done "after conviction or after a plea of guilty or nolo contendere for any crime or offense not punishable by death or life imprisonment," and that the statute contains no limitation as to the time after conviction, plea of guilty, or nolo contendere, within

which the power must be exercised, except that it shall appear to the satisfaction of the court that the ends of justice, etc., will be subserved thereby. The statute is obviously a remedial one, and therefore should, if necessary, be given a fairly liberal construction.

Petitioner further contends that to hold that the Act does not empower the court of original jurisdiction to grant probation after the term of court at which the sentence was pronounced, has passed, or after the defendant has entered upon the service of his sentence, either in a common jail or the penitentiary, would be reading into the statute, by judicial construction, a limitation not written there by the law-making body, and that this, under the rules of law, should not be done. The Government may, and probably will contend, that the words, "to suspend the imposition or execution of sentence and to place the defendant upon probation" mean that the suspension of the execution of sentence must be the entire sentence and that the statute not containing the words "suspend the further execution of the sentence" the Probation Act does not grant the power to place upon probation one who has commenced the service of his sentence. One is imprisoned from the moment of incarceration to the end of confinement, and the expression "to suspend the execution" fits a person already serving a sentence just as well as one who has not commenced the service of the sentence, although it has been pronounced. As we will later point out, there are other reasons why the statute should be held to apply to those already serving their sentences, since to

hold otherwise would narrow the scope of the statute to a point where its usefulness would practically be destroyed.

ADJUDICATED CASE DEALING WITH FEDERAL PROBATION LAW

A. Holding in the Instant Case

In the insant case the Circuit Court of Appeals for the Fifth Circuit placed its holding that the Act does not empower the court of original jurisdiction to place Petitioner upon probation, upon two grounds: (1) That the term of court at which Petitioner was convicted and sentenced had expired, and (2) that Petitioner was serving his sentence in the Penitentiary at the time of applying for and obtaining probation. In this connection it said (R. 53, 54):

> "Nothing in the Probation Act indicates an intention to change the law as to the effect of the expiration of a term of court on the court's control or jurisdiction of a case in which a final judgment was rendered during that term," and "Nothing in the language of the Probation Act indicates an intention to change or add to the existing laws on the subject of releasing, before the expiration of the time for which they were sentenced, persons confined in execution of judgments of conviction of offenses against the laws of the United States."

Whether the Government contends that the Act does not cover a situation where the term of court has expired but the defendant has not entered upon the service

of the sentence, we can not say, as there are several decisions by Circuit Courts of Appeal holding directly to the contrary, and the Government's brief, in resistance of the granting of the application for certiorari in this case, would indicate, to say the least, that it relies on the proposition that the statute at all events does not empower the court to place upon probation one who has entered upon the service of his sentence. It would seem that if the statute applies after the term of court has expired, there is no logical reason why it should not apply even though the applicant is serving his sentence. In other words, the position of the Circuit Court of Appeals in the instant case is infinitely more logical than the position that the Act applies even though the term has expired, but not to a situation where the applicant is in the penitentiary. If the statute has the effect of overriding the well established rule of law then existing that the Court loses all control of the judgment at the expiration of the term, then we submit there is utterly no reason why it should not be held to have modified the equally well established and then existing rule of law that the Court loses control of the sentence in a criminal case when the defendant enters upon the service thereof.

B. Decisions of Other Federal Courts Regarding Probation

The first case dealing with this question, so far as our search of the reports reveals, is the case of *Nix* v. *James*, District Judge, 7 Fed (2nd), 590. Nix, who had been convicted and sentenced at a term of court which had expired long prior to the passage of the Probation Act, made application to the Circuit Court of Appeals for

the Ninth Circuit, for a writ of mandamus to compel the District Judge presiding over the court in which Nix was convicted, to hear and consider his application for probation. It appears that after conviction, Nix prosecuted an appeal by writ of error to said Circuit Court, where the judgment of conviction was in all things affirmed, and that prior to entering the penitentiary to commence the service of his sentence, the Probation Act had been passed, and thereupon he filed in the Court of original jurisdiction his application for probation. The District Court being of the opinion that it was without power to hear and consider the application, dismissed it, and thereupon the writ of mandamus was applied for, as above stated. The Court granted the writ, and in an elaborate and well reasoned opinion pointed out that the Act in question was remedial in its nature, and since its terms are, "shall have the power after conviction or after a plea of guilty or nolo contendere for any crime or offense not punishable by death or life imprisonment" to suspend the imposition or execution of sentence and place the defendant upon probation, and did not by its terms place any limitation upon the time within which the power should be exercised, that it applied to cases of conviction before the passage of the Act, even though the term of Court at which the conviction and sentence took place had long since expired, stating in its opinion that to hold otherwise would be reading into the Act a limitation on the power granted not written there by Congress. It will be observed, then, that the holding of said Court is in direct conflict with the holding of

the Circuit Court for the Fifth Circuit in the instant case. In the course of its opinion, the Court said:

> "The statute plainly contemplates that in cases falling within its purview the District Court shall retain control of the punishment to be meted out after sentence is pronouced and after the expiration of the term." And
>
> "These provisions of the statute clearly authorize the District Court to modify from time to time the sentence imposed on a defendant, even after the expiration of the term at which sentence is pronounced." And
>
> "The new power vested in the District Courts is available to them 'after conviction or after a plea of guilty or nolo contendere.' The statute does not say how soon after conviction or plea the power must be exercised. In view of the liberal construction to which the statute is entitled we cannot read into it a limitation on the power granted not written there by Congress."

The Court, after citing among other authorities, 2 Lewis' Sutherland on Statutory Construction (2d Ed.) S. 583, *Lovejoy* v. *Isbell*, 70 Conn., 557, on the proposition that a remedial statute should be construed liberally, discucced the case of *Sommers* v. *Johnson*, 4 Vt. 278, 24 Am. Dec. 604. This case involves the construction of a statute for the relief of imprisoned debtors which provides a method for one imprisoned for debt obtaining his release. The pertinent part of the statute is "whenever any person is imprisoned," etc. The contention was made that by reason of said words the statute

granted relief only to those who should be committed to prison after the passage of the Act and not to those already incarcerated. In that case the Court held that the statute was remedial in its nature, entitled to a liberal construction, and said:

> "Any man is imprisoned each moment from the time of his commitment to the time of his dicharge; and there is no reason to believe that the Legislature intended to provide relief for those, who should afterwards be committed to prison, and leave in perpetual imprisonment those whose hard bondage alone dictated the necessity for the statute."

The Court, in the Nix case, in the course of its opinion, on Page 594, stated that nothing contained in the opinion should be construed as holding that the Probation Act has any application to a defendant who had entered upon the service of his term of imprisonment. This, as we view it, was clearly a disclaimer of any intention to pass on an issue not before the Court, and from a reading of the opinion it would appear that the Court felt called upon to make such disclaimer by reason of the fact that every reason assigned why the Probation Act applied, notwithstanding the expiration of the term, was just as good a reason why it should apply even though the service of the term of imprisonment had commenced. At all events, the question of whether or not it applied to those already imprisoned was not before the Court, as the applicant, Nix, has not entered upon the service of his sentence.

After the granting of the writ of mandamus in the

aforesaid Nix case, Nix again applied to the Court of original jurisdiction for probation, and while the Court refused his application for probation upon its merits, nevertheless it made the following statement in its opinion (*United States* v. *Nix*, 8 Fed. (2nd), 759):

> "It is my understanding that the opinion of the Circuit Court of Appeals, filed in this matter August 3, 1925, has the effect of continuing control in the court of the judgment until the judgment is satisfied. Accordingly, I shall deny the application for probation at this time, without prejudice to its renewal one year from the date upon which defendant shall enter upon the sentence imposed."

The case of *Kriebel* v. *United States*, 10 Fed. (2nd), 762, decided by the Circuit Court of Appeals for the Seventh Circuit, is one in which the facts, so far as they are pertinent, are identical with those in the Nix case. Conviction was for violation of Sec. 215 and Sec. 37 of the Criminal Code, a penitentiary sentence, and fine was imposed at a term of Court which expired prior to the passage of the Probation Act, and after prosecuting an appeal by writ of error, Kriebel applied for probation before entering upon the service of his sentence. The District Court, like the District Court in the Nix case, was of the opinion that it had no power to grant the application since the term of court had long since expired. The Circuit Court, however, reversed the judgment, expressly approved the holding in the Nix case with this distinction, that it was of the opinion that to grant probation would not change or modify the judgment or sentence, but merely suspend the execution thereof in the

manner designated in the judgment, leaving, however, the judgment and sentence unchanged. In the course of its opinion the Court said:

> "We are concerned here with a grant of power. The statute fixes a time when the exercise of it may begin, providing that it may be done 'after conviction or after a plea of guilty or nolo contendere,' but there is no limitation in the statute that it shall not be exercised after some other event."

As in the Nix case, what the Court here said, "but there is no limitation in the statute that it shall not be exercised after some other event" is just as good a reason why the statute should apply to the case of one already imprisoned as to a defendant convicted at a term of court which had long since expired, but who had not entered upon the service of the sentence.

The case of *Evans* v. *District Judge*, 12 Fed. (2nd), 64, decided by the Circuit Court of Appeals for the Sixth Circuit, is one in which the holdings in the Nix and Kriebel cases were expressly approved. Without detailing the facts, it is sufficient to say that in so far as they are pertinent they were the same as in those cases.

The case of *Ackerson* v. *United States*, 15 Fed. (2nd), 268, is another case on all fours with the Nix and Kriebel cases, and it follows them. This case also stands for the doctrine that the Court, in the absence of a statute to the contrary, lost all control of its judgment at the expiration of the term, and the fact that the case was pending on appeal made no difference, for that when the

mandate was returned affirming the judgment of the Trial Court, no order could be entered inconsistent therewith. The Government seems to be of the opinion that the fact that probation was granted in these cases during the term of court at which the mandate from the Circuit Court of Appeals, respectively, was received, might make some difference. The opinion in said case shows the fallacy of such contention, and such a distinction is obviously unfounded in law, for the law is well settled that where a judgment on appeal has been affirmed, the court can not change or alter it upon receipt of the mandate, even during the term of Court at which the mandate is received.

State Ex Rel Zabel v. *Municipal Court*, 179 Wis., 195; 190 N. W., 121.

The case of *United States* v. *Chafina*, 14 Fed. (2nd), 622, decided by Judge Jacobs of the District of Arizona is directly in point, and we submit that the reasoning in the opinion is sound. Judge Jacobs in granting probation to a person already serving her sentence of imprisonment said:

> "To hold otherwise would be as is said in the case of Nix vs. James, 7th Fed. 590, reading into the Act a limitation on the power granted, not written there by Congress. I am of the opinion that the Act clearly vests power in the Trial Court to admit a defendant upon probation at any time after conviction, either before or after service of the sentence has commenced, and before the full term of the sentence has been served."

The case of *United States* v. *Davis et al.*, 19 Fed. (2nd), 536, decided by the District Court of the Eastern District of Idaho, presumably relied upon by the Government, is one in which application for probation was made after conviction and sentence, but prior to entering upon the service thereof, for a sufficient length of time to permit the defendant to present an application to the President of the United States for executive clemency. The Court stated that it was conceded that the statute authorized the granting of probation prior to the time of entering upon the service of the prison sentence and cited the Nix, Kriebel, Evans and Ackerson cases. It denied the application, however, upon the theory that no proper grounds were presented for the granting of the same since the basis of it was for time to submit an application to the President for a pardon. This case, then, is in direct conflict with the Government's contention regarding the granting of probation after the expiration of the term, and it in no way or manner involves the question of whether or not the statute applies where the person is serving a sentence of imprisonment.

In the case of *Miller* v. *Snook*, 15 Fed. (2nd), 68, decided by Judge Sibley of the Northern District of Georgia, cited by the Government in its brief resisting the granting of the application for certiorari herein, does not involve the question of probation at all, and the Court in its opinion expressly so stated. In that case a penitentiary sentence was imposed, and a commitment issued and placed in the hands of the marshal. Two hours

after the marshal had started on the road to the penitentiary with the defendant, Miller, and during the term of Court at which the sentence had been pronounced, the Court entered an order reducing the term of the sentence. The only question involved in the case was whether or not the warden of the penitentiary was bound to recognize the second order, and commitment thereon, since he had no notice thereof until after the prisoner had been received at the penitentiary by virtue of the original commitment. There is in this case considerable discussion of the division of power between the executive and the judicial branches of the Government, but the effect of the Probation Act is in no way or manner involved or discussed.

The case of *United States* v. *Young et al.*, 17 Fed. (2nd), 129, a District Court case, with opinion by Judge St. Sure of the Northern District of California, relied upon by the Government, is one in which the Court denied the applications for probation of all the defendants in said case upon their merits. As to one defendant, however, who had entered upon the service of a prison sentence, the Court stated in substance that that fact was sufficient ground for denying the application, as the Court was of the opinion that the prevailing view was that the Probation Act did not empower the Court to grant probation after the service of a sentence had commenced, as is disclosed by the opinion. However, the Judge in said case expressly states that he was originally of the same opinion held by Judge James, who dismissed Nix's application for probation upon the

ground that the jurisdiction to hear it did not exist, as the term had expired, resulting in the mandamus proceedings in the Circuit Court for the Ninth Circuit. Judge St. Sure having been compelled by the holding of the Circuit Court in the Nix case to recede from his original position, was not willing to go farther than the holding therein.

There are at least three reported cases decided by District Courts which have held that the Probation Act does not grant the Court of original jurisdiction the power to place upon probation one who has commenced the service of a sentence of imprisonment:

Archer v. *Snook*, 10 Fed. (2nd), 567;
Davis v. *United States*, 15 Fed. (2nd), 697;
Mouse v. *United States*, 14 Fed. (2nd), 202.

In the *Archer* v. *Snook case*, 10 Fed. (2nd), 567, Judge Sibley of the Northern District of Georgia seems to place his holding that the Probation Act does not apply to a case where the applicant is serving his sentence in the penitentiary, primarily, if not entirely, upon the ground that the penitentiaries are usually situated a great distance from most of the Judges, and that it would involve much complication to place persons on probation after they have entered the penal institutions. We submit that there is no merit in this contention, and that a complete answer thereto is that it is no greater hardship to return a person from the penitentiary than it is to place him there. The officers in charge of the United

States Penitentiaries are agents of the executive department of the Government, a co-ordinate department, and it is upon the authority of the judgment and commitment of a Court that they receive and hold prisoners. As has been well stated, we are concerned here with a grant of power, and if Congress has seen fit to grant the power to the courts of original jurisdiction, we submit that the distance of the penitentiary from the Judges furnishes no basis for concluding that the Act was not intended to apply to cases where the applicants are already in the penitentiary.

In the case of *Davis* v. *United States*, 15 Fed. (2nd), 697, Judge Youmans of the Western District of Arkansas, placed his holding that the Probation Act did not empower the courts of original jurisdiction to place upon probation a person serving a sentence in the penitentiary, upon two grounds, (1), that the term at which the applicant was sentenced had expired, and (2), that the Act in no way applied after service of the sentence had commenced, holding that the Act did not change or alter the pre-existing rules of law, with respect to losing control of the judgment at the expiration of the term and likewise at the commencement of the service of the sentence.

Judge Pollack, District Judge for the District of Kansas, in the case of *Mouse* v. *United States*, 14 Fed. (2nd), 202, took the position that while the Act applies notwithstanding the expiration of the term at which the sentence was imposed, yet it did not apply if service of the

sentence in a penitentiary had commenced, upon the ground that the Courts should not be permited to invade the penal institutions of the country during the term of imprisonment and "after all jurisdiction over the subject matter and the person of the offender has been lost." We submit that there is no occasion for sounding a note of alarm if the Probation Act is to be construed so as to empower the District Courts to place upon probation persons serving sentences in the penitentiary, for if the District Courts can be entrusted with the discretionary power to impose sentences ranging from a dollar fine to many years in the penitentiary, they surely can be entrusted with the power to grant probation, in their discretion, to persons in prison, when it shall be made to appear to the satisfaction of such courts that the best interests of the public, as well as the applicants, will be subserved thereby. To say "after all jurisdiction over the subject matter and the person of the offender has been lost" is simply arguing in a circle, for the question to be determined is whether or not Congress, by the Probation Act, has continued control of the subject matter and the execution of the judgment in the Court of original jurisdiction until the judgment has been satisfied. If that power has been granted, then all jurisdiction over the subject matter and the person of the offender has not in fact been lost.

STATE COURT DECISIONS REGARDING PROBATION LAWS

In may be profitable to briefly refer to the holdings of State Courts under the various probation laws.

The case of *State* v. *Teal*, 108 S. C., 455; 95 S. E., 69, by the Supreme Court of South Carolina, is one in which Teal was convicted of seduction and sentenced to three years in the penitentiary, the judgment providing that if the defendant should deposit certain money each year, commencing on a given date, for the support of the child of the prosecuting witness, eighteen months of the sentence should be suspended; that failing to do so, the suspension of the last eighteen months should be revoked, and the defendant required to serve the full three years. The authority for this suspension of the sentence after service of the first eighteen months thereof is found in the Act of February 15, 1912, 27 Stat. L., Page 773, S. C., which so far as it is pertinent, reads as follows:

> "Circuit Judges of this State shall have the power and authority, in their discretion, to suspend sentences imposed by them, upon such terms and upon such conditions as in their judgment may be fit and proper."

The Supreme Court upheld the aforesaid judgment and obviously the language of the statute under which it falls is nothing like as strong in our favor as the language of the Federal Probation Act.

Reference to the opinion of Judge Sibley, in the case of *Archer* v. *Snook*, 10 Fed. (2nd), 567, ante, discloses

that at the time of imposing the sentence the Court was of the opinion that the latter part of the sentence could be suspended and the defendant placed upon probation. This is exactly what was done in the South Carolina case. However, when Archer sought release by habeas corpus, Judge Sibley had changed his mind.

The holding in the case of *Antonio* v. *Milliken*, 9 Ohio App., 356, is substantially the same as that in the *State* v. *Teal case*.

The Government relies upon the case of *State* v. *Ensign*, 38 Idaho, 539; 223 Pac., 230. In that case, after the service of a jail sentence had commenced, the trial court entered an order annulling the jail sentence and remitting the fine. On appeal it was held that there was utterly no authority for such procedure and that the probation statute of Idaho (C. S. 9041) required that any character of probation under the statute had to be granted at the time of rendering the judgment and become a part thereof. The Court said:

> "The provisions of C. S. 9041, relating to parole and suspension of sentence, must be exercised by the Court at the time of the rendition of the judgment, and such parole or suspension of sentence must be included therein and become a part thereof, and can not be revoked at a date subsequent thereto."

Obviously this holding is based upon the fact that the statute required that the suspension of sentence be made at the time the judgment is entered and be a part there-

of. It goes without saying, that the trial court had not attempted to comply with the state statute, if it in fact assumed to act thereunder, as the order was one annulling the jail sentence entirely and remitting the fine, which is neither parole nor suspension of sentence. This case does not support the Government's contention in any particular, as the holding was based entirely upon the terms of the statute, and the Government concedes that it is not necessary under the Federal Probation Act that probation be granted at the time of pronouncing judgment, but may at all events be granted at any time prior to the expiration of the term at which the sentence is pronounced.

The Government likewise relies on two Montana cases, to-wit: *State Ex Rel Reid* v. *District Court*, 68 Mont., 309; 218 Pac., 558, and *State Ex Rel Bottomly* v. *District Court*, 73 Mont., 541; 237 Pac., 505. These cases arose under Chap. 21, laws of 1913, Sec. 12078-12086, laws of Montana. In the first case the Supreme Court of Montana held that the order granting a suspension of sentence and placing the defendant upon probation had to be made at the time of the entry of the judgment and be a part thereof, indicating that if it was done at a later date it would constitute an encroachment on the pardoning power of the Governor. However, in the latter case the Court expressly repudiated that notion, and held that to grant probation constituted no encroachment upon the pardoning power of the Governor, as the sentence still remained in existence and was no different than a parole by a parole board, which

had been held by all the Courts not to encroach on the pardoning power. In the course of its opinion in the Bottomly case, at page 526, the Court said:

> "Since the only limitation imposed by the statute is that the order of suspension be made before the defendant is committed, this Court should accept it as expressing the Legislative will that no other limitation was intended to be imposed."

It will be observed, then, that the Supreme Court of Montana, in its final disposition of this question, held that probation could be granted at any time prior to the entering upon the service of the sentence of imprisonment and that probation could not be granted thereafter, because the statute contained an express limitation that it should not be granted after service of the sentence had commenced. The Court's statement that it must accept the statute as explaining the Legislative will is important. Applying this reasoning to the Federal Probation Statute, we submit that there is no limitation as to the time within which the power to place upon probation shall be exercised, except that it shall be after conviction or after a plea of guilty or nolo contendere, and except that it shall be made to appear to the satisfaction of the Court that the ends of justice and the best interests of the public, as well as the defendant, will be subserved thereby.

The Government relies on the case of *State Ex Rel Zabel* v. *Municipal Court*, 179 Wis., 195; 190 N. W., 121. This case was decided under a statute which says: "When any adult is convicted of a felony punishable by

imprisonment for a term not exceeding ten years * * *, and it appears to the satisfaction of the Court * * *, said Court may, except as otherwise provided for by law, by order, suspend the judgment or stay the execution thereof and place the defendant on probation * * *."

In said case the trial court entered an order placing the defendant upon probation while the case was pending on appeal, the mandate not having been returned. The Court, however, anticipated that a new order placing defendant upon probation might be sought to avoid the objection that the case was pending on appeal and announced its conclusion that the trial court would still be powerless to grant probation since the term of court at which defendant was sentenced had long since expired and the judgment and sentence had become the judgment and sentence of the Appellate Court. The Court in its opinion, Page 200, observes that the statute does not prescribe the time during which the power to "suspend the judgment or stay the execution thereof and place the defendant upon probation" is to be exercised. While this may be true, yet this statute in at least two respects is different from the Federal statute, (1), that it uses the present tense, when "any adult is convicted," and (2), says "except as otherwise provided for by law." The first statement might be construed as indicative of a Legislative intent to prescribe that the probation must be granted when the person is convicted. The second might be indicative of a Legislative intent not to change the existing rule of law regarding the loss of control of

the judgment at the expiration of the term. At all events, no such provisions are contained in the Federal Probation Act, and if such provisions are not sufficient justification for the judgment rendered by the Wisconsin Court, then the holding is in direct conflict with the decisions of four United States Circuit Courts of Appeal, as already pointed out.

STATUTORY CONSTRUCTION

A cardinal rule of statutory construction is that where the terms of the statute are unambiguous and do not involve an absurdity, it is the duty of the Court to give effect to the language as written regardless of any supposed notion as to what might afterwards seem advisable that the law-making body should have provided for. This rule is no better illustrated than by the Honorable Supreme Court's interpretation of what is commonly known as the White Slave Traffic Act. In the famous Caminetti case, 61 L. Ed., 442, this Honorable Court held that irrespective of the fact that Congress might have intended the Act to apply only to commercialized vice or traffic in women for gain, and not to mere personal episodes between men and women, which was practically conceded, the Act by its plain terms covered both situations, and that the Court could not by construction exclude from the operation thereof cases of mere personal episodes. The Court said:

> "It is contended that the Act of Congress is intended to reach only commercialized vice, or the traffic in women for gain, and the conduct of petitioner, however reprehensible in morals, is not

within the purview of the statute, when properly construed in the light of its history, and the purposes intended to be accomplished by its enactment. It is elementary that the meaning of the statute must, in the fist instance, be sought in the language in which the Act is framed, and if that is plain, and if the law is within the constitutional authority of the law-making body that passed it, the sole function of the court is to enforce it according to its terms. Where the language is plain and admits of no more than one meaning, the duty of interpretation does not arise, and the rules which are to aid doubtful meaning need no discussion."

In the case of *Hamilton* v. *Rathbone*, 44 L. Ed., 219, the Supreme Court said:

> "But where the Act is clear upon its face, and when standing alone, it is fairly susceptible of but one construction, that construction must be given to it."

In the case of *Holy Trinity Church* v. *United States*, 143 U. S., 457, Justice Brewer, speaking for the Supreme Court, said:

> "The primary and general rule of statutory construction is that the intent of the law-maker is to be found in the language he has used. * * * No mere omission, no mere failure to provide for contingencies, which it may seem wise to have specifically provided for, justify any judicial addition to the language of the statute."

The rule of statutory construction laid down in the foregoing cases is in substance the same rule applied to the construction of written instruments, to-wit, that

where they are unambiguous, their meaning must be found in the language that has been used, and that it is not competent to look to the discussions leading up to the making thereof or the understanding of the parties in arriving at what it meant. Applying this rule to the Act in question, we submit that the Act is plain and empowers the Court of original jurisdiction to place upon probation a defendant convicted at a term that has long since expired and who is serving his sentence in the penitentiary; that the statute contains no limitation on the time when the power shall be exercised except that it shall be "after conviction or after a plea of guilty or nolo contendere" and that "it shall appear to the satisfaction of the Court that the ends of justice and the best interests of the public, as well as the defendant, will be subserved thereby." As already pointed out, four United States Circuit Courts of Appeal have held that to hold that the statute did not apply where the term at which the sentence was imposed had expired, would be reading into the Act a limitation not written there by Congress. It would be, as we view it, providing by judicial construction, something which according to individual notions might seem wise to have been provided for, which this Court, in the case of *Holy Trinity Church* v. *United States*, ante, said should not be done. Let us go a step further and assume that the statute applies, even though the term has expired, and consider the question of whether or not it applies where the party has entered upon the service of the sentence in a jail or penitentiary. What language in the statute indicates that the line should be

drawn at that point? We submit that there is no such limitation in the statute and that the Court should not read such a limitation into it, regardless of what might be thought was the individual intention of the members of Congress who passed the law.

ADVISABILITY OF CONSTRUCTION CONTENDED FOR FROM STANDPOINT OF SUPPOSED BENEFICIARIES THEREUNDER

If it is finally held that the statute does not apply where the term of Court at which the judgment and sentence were entered has expired, then it is obvious that some of the humane purposes obviously intended by the law-makers will not be accomplished in those cases where persons convicted feel themselves so aggrieved that they take an appeal to the Circuit Court of Appeals, for it is common knowledge that with the crowded dockets as they now exist and probably will continue to exist, the term of Court will long since have expired before the mandate is returned. We can not believe that there is any sound reason why a party should be cut off from the benefits of the probation law, simply because he appeals his case. There may be those who entertain the idea that this constitutes a defiance and that therefore, one appealing should not expect any of the mercies provided by the probation law. But the better opinion seems to be that since one has a right to appeal from a conviction, and there are occasionally persons who are unjustly convicted, that no punishment should result from an appeal.

On the other hand, if it is finally held that the fact that the term of Court has expired makes no difference to the granting of probation, but that it can not be granted after the service of the sentence has commenced, no relief can be granted to persons receiving merely a jail sentence, as the parole law does not apply to them and ordinarily they pass into the custody of the marshal immediately upon being sentenced, to commence the service of their sentences. The argument is advanced that the probation law should not apply to a person serving his sentence in the penitentiary, upon the ground that the parole law is sufficient to prevent unjust punishment. But what is to become of the persons who receive merely jail sentences who can derive no benefit from the parole law? In both cases, if the Government's contention is to prevail, they will be cut off from the benefits of the Probation Act simply because they have entered upon the service of their sentences. For example, take the Murray case, now pending in this Court. There a jail sentence was imposed, and it must be conceded that the parole statute affords no relief for Murray. The foundation of the Government's contention rests not upon the character of the institution in which the prisoner is confined, but merely upon the fact that the Probaton Act has in no manner changed the then existing rule of law that the Court loses absolute control of the judgment when the defendant enters upon the service of the sentence.

It will not be seriously contended that Congress did not have the power to pass a law giving the Court of

original jurisdiction the power to place upon probation persons serving their sentences in the penitentiary. There is no conflict between the parole law and the Probation Act, upon the same theory that there is no conflict in the parole law and the pardoning power which is vested in the President. It is simply a question of what Congress has done by the passage of the Act.

ADVISABILITY OF CONSTRUCTION CONTENDED FOR FROM STANDPOINT OF WHETHER DISTRICT COURTS SHOULD BE ENTRUSTED WITH THE POWER

Were it permissible to consider what may have been in the minds of the individual member of Congress, still we see no reason for concluding that Congress should not have intended the statute to apply to those persons already serving their sentences. Certainly Congress was providing a remedy and had in mind that the existing laws were wholly inadequate in that the parole law which had long been in force and effect, the law allowing a certain time for good behavior (Comp. S. 10532) and the pardoning power vested in the President, were wholly inadequate, otherwise it would not have thought that there was any necessity for providing a new remedy. The pardoning power in scope was broad enough to cover the case of every person convicted, but as a practical matter it was inadequate, and therefore the parole law was passed. This law provided a remedy for only those persons who were in the penitentiaries and had

served a third of their term of imprisonment (Comp. S. 10535). It did not cover the cases of persons sentenced to serve terms of imprisonment in jail. As the law had wisely surrounded the person charged with the commission of an offense with every safeguard to prevent his unjust conviction, undoubtedly Congress deemed it expedient and proper to surround those already convicted, or that might be convicted, with every safeguard against unjust punishment after conviction. The Government's position on the advisability of the construction of this statute, for which we contend, seems to be substantially the same as that expressed by Judge Pollock, to-wit: That to give such an interpretation to the probation statute would permit the courts to invade the penal institutions of the country and take therefrom persons serving their sentences. But why should this be alarming or be considered unwise? Surely the District Judges who have exercised the discretionary power of imposing sentences that might range from a one-dollar fine to many years in the penitentiary can be entrusted to administer the probation law fairly and to the best interests of society. In most instances they are far more familiar with the actual facts than any other person or body entrusted with the granting of any character of clemency. Usually they are in a far better position to discover the existence of facts and circumstances which point conclusively to the fact that the best interests of society and the convict will be best subserved by leniency being granted. So that from the standpoint of what might now seem wise for Congress to have pro-

vided for, we submit that there is no logical reason why one should conclude that Congress did not intend the Act to apply to those persons serving their sentences.

LOOKING TO COMMITTEE REPORTS AND CONGRESSIONAL DEBATES FOR AID IN INTERPRETING THE ACT

Assuming it to be proper to look to committee reports and congressional debates preceding the passage of the Probation Act for aid in interpreting the same, which we think is doubtful, as the language of the Act is plain, we submit that because these show an intention to pass a probation act in line with acts passed by the various States of the Union is no ground for concluding that the Act in question was not intended to apply to those persons already serving their sentences in the penitentiary, for at least two State statutes then in existence have been held to apply to persons serving their sentences, to-wit: That statute of Ohio in the case of *Antonio* v. *Milliken*, 9 Ohio App., 356, and the South Carolina statute in the case of *State* v. *Teal*, 108 S. C., 455; 95 S. E., 69. We contend that it does not appear from the congressional record, or anything that the Government advances in connection therewith, that in passing the Act, Congress was attempting to pattern after any particular act. Since the State statutes on this subject are by no means uniform, and under the language of some the Courts have held that persons already incarcerated are the beneficiaries thereof, and under the language of

others they have held otherwise, the statute in question must be interpreted by the language in which it is framed.

The Government contends, however, that the decisions of the New York Courts are in point, as the New York probation statute was one of the laws used as a model for the Federal law. The New York probation law in force at the time the Federal statute was enacted, as is admitted by the Government in its brief, in opposition to the granting of the writ of certiorari herein, reads in part as follows:

> "A court * * * may suspend sentence or impose sentence and suspend the execution of the whole or a part of the judgment and may in either case place the defendant on probation in accordance with the provisions of section eleven-a of the code of criminal procedure * * * Provided, however, that the imprisonment directed by the judgment, shall not be suspended or interrupted after such imprisonment shall have commenced." (Sec. 2188, Criminal Code, 1924).

If Congress did not intend the Act to apply to persons already serving their sentences of imprisonment, why did they not insert a provision expressly so stating, like the one contained in the New York law? It seems to us to be reasonable to suppose that if the law-makers were pattering after the New York law and intended that the Act should not apply to those persons serving their sentences of imprisonment, they would have done just what the law-making body in New York did—insert a provision expressly so stating. The fact that they did not do

this, is an indication that they did not intend to follow the New York law to that extent.

It may be suggested by the Government that from the fact that the Committee Report on the bill in question shows that it was not intended to pass anything radical, that the Act should not be applied except to those cases that would arise in the future, or at least before the term of court at which the prisoner had been sentenced had expired, and in no event to those persons confined in the penitentiary, since this would abrogate the long existing law that after the term of court has expired the court loses control of the judgment, and likewise the long existing law that in the absence of statutory authority the court loses control when the person enters upon the service of the sentence. Of course a change was brought about by the passage of the Probation Act, but we do not think that any radical change can be held to have been effected thereby, even though the control of the judgment is vested in the trial court, until it has been fully satisfied. It is conceded by the Government, and as a matter of fact was decided in the case *Ex Parte United States*, 242 U. S., 27, that as the law then existed the court did not have the power to suspend the imposition of sentence after conviction. Certainly so far as suspending the imposition of sentence is concerned a very emphatic change in the law has been brought about by the passage of the Probation Act. The old law was overturned, and a new condition of affairs in this respect brought about. Certainly if the change for which we

contend might be considered radical, so should the change admittedly effected be considered radical, to say nothing of the change that has been effected if it is held that the statute applies notwithstanding the expiration of the term.

CONSTITUTIONALITY OF THE PROBATION ACT

As to the constitutionality of the Probation Act, we do not think there is much ground for the entertainment of any serious doubt on this subject. To begin with, a Probation Act of this general character had the advance approval of the Supreme Court of the United States, 242 U. S., 27, in which the Court in substance recommended that such an Act be passed to the end that the District Courts might be in a position to deal more justly with those persons convicted of crime. In the second place, the Act was specifically passed upon and upheld by the Circuit Court of Appeals for the Ninth Circuit in the case of *Nix* v. *James*, 7 Fed. (2nd), 590, and the conclusion of the Court on this question in that case has been impliedly, if not expressly, approved by the decision of each of the courts that have passed on the Probation Act in any form. At all events, no case has held or even indicated that the statute might, for any reason, be unconstitutional. Substantially the only ground advanced is that it might be an encroachment on the pardoning power of the President under the Constitution. The Parole Act passed June 25, 1910, was not considered as violative of the Constitution, or an encroachment on the

pardoning power, and that statute has been expressly passed upon in the following cases:

Anderson v. *Carroll*, 263 U. S., 192; 68 L. Ed., 247;
O'Brien v. *McClaughry*, 209 Fed., 819;
Thompson v. *Duehay* (D. C.), 217 Fed., 484; affirmed (C. C. A.), 223 Fed., 305.

While the pardoning power granted to the President is exclusive, the granting of parole under the Parole Act was not considered an encroachment on the pardoning power upon the ground that the granting of parole merely suspends the execution of operation of the sentence so far as incarceration is concerned, while a pardon overrides and does away with the conviction, judgment and sentence. The granting of probation under the Probation Act, like the granting of a parole, does not wipe out the sentence, but merely suspends for the time being its execution in the manner and place designated in the original judgment, leaving the offender subject to be placed in confinement in accordance with the original sentence, should the Court see fit to revoke the probation.

CONCLUSION

In view of the foregoing, it is respectfully submitted that the judgment of the Circuit Court of Appeals should be reversed and the judgment of the trial court, granting petitioner probation, be in all things affirmed.

Respectfully submitted,

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